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4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 THE BANK OF NEW YORK MELLON,
8 Plaintiff(s),
9 v.
10 TAYLOR WALES, et al.,
11 Defendant(s).

Case No. 2:17-CV-2896 JCM (EJY)

ORDER

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13 Presently before the court is third-party defendant Rugged Oaks Investments, LLC's
14 ("Rugged Oaks") motion to dismiss (ECF No. 74) defendant/counterclaimant/third-party plaintiff
15 Taylor Wales' third-party complaint (ECF No. 57). Wales filed a response (ECF No. 77), to which
16 Rugged Oaks replied (ECF No. 78).

17 Also before the court is plaintiff/counterdefendant Bank of New York Mellon's ("BNYM")
18 motion for summary judgment (ECF No. 79) on Wales' first and second counterclaims (ECF No.
19 57). Wales filed a response (ECF No. 82), to which BNYM replied (ECF No. 86).

20 Also before the court is Wales' motion for summary judgment (ECF No. 83) on his first
21 and second counterclaims (ECF No. 57). BNYM filed a response (ECF No. 87), to which Wales
22 replied (ECF No. 88).

23 **I. Background**

24 This action arises from a dispute over real property located at 5253 Saranac Road, Las
25 Vegas, Nevada 89130 ("the property"). (ECF Nos. 1, 20).

26 On March 9, 2005, Susan and James Pharo (collectively "Pharos") refinanced the property
27 with a loan in the amount of \$252,000.00 from Home Loan Center, Inc. dba Lending Tree Loans
28 ("Lending Tree"). (ECF Nos. 20, 27). Lending Tree secured the loan with a deed of trust, which

1 it recorded with the Clark County recorder's office on March 17, 2005. (ECF Nos. 20, 27).
2 Thereafter, BNYM acquired all beneficial interest in the deed of trust via an assignment, which
3 was recorded with the Clark County recorder's office. (ECF Nos. 20, 27).

4 On March 23, 2012, Los Prados Community Association ("Los Prados"), through its agent
5 Nevada Association Services ("NAS"), recorded a notice of delinquent assessment lien ("lien")
6 against the property for the Pharos' failure to pay Los Prados in the amount of \$1,677.00. (ECF
7 Nos. 20, 27). On May 8, 2012, Los Prados recorded a notice of default and election to sell pursuant
8 to the lien, stating that the amount due was \$2,830.00. (ECF Nos. 20, 27).

9 On June 13, 2012, Bank of America, N.A. ("Bank of America"), as then-servicer of the
10 loan, requested a ledger from Los Prados identifying the superpriority amount owed to it. (ECF
11 Nos. 20, 63, 79-7). Bank of America received no response. (ECF Nos. 20, 63, 79-7). Bank of
12 America then used an account statement for another property within Los Prados to calculate the
13 superpriority amount. (ECF No. 79-7). On June 29, 2012, Bank of America submitted payment
14 to Los Prados, through NAS, in the amount of \$1,361.25. (ECF Nos. 20, 63, 79-7). NAS rejected
15 the payment. (ECF Nos. 20, 63, 79-7).

16 On October 11, 2012, Los Prados recorded a notice of foreclosure sale against the property.
17 (ECF Nos. 20, 27). On November 9, 2012, Los Prados sold the property in a nonjudicial
18 foreclosure sale to Rugged Oaks in exchange for \$14,800.00. (ECF Nos. 20, 27). On November
19 15, 2012, Los Prados recorded the deed of foreclosure. (ECF Nos. 20, 27). Wales purchased the
20 property from Rugged Oaks on or about August 13, 2014. (ECF Nos. 20, 57).

21 On November 17, 2017, BNYM initiated this action against defendants Wales, First
22 California Mortgage Company, Los Prados, and Federal National Mortgage Association
23 (collectively "defendants"). (ECF No. 1). In its amended complaint, BNYM alleged four causes
24 of action: (1) declaratory judgment that the foreclosure sale was void; (2) declaratory judgment
25 that BNYM may sell the property in a judicial foreclosure sale; (3) judicial foreclosure; and (4)
26 injunctive relief. (ECF No. 20).

27 On April 24, 2018, the defendants moved to dismiss BNYM's amended complaint. (ECF
28 No. 27). On August 30, 2018, Wales filed a third-party complaint against Rugged Oaks alleging

1 three causes of action for breach of contract and requesting specific performance. (ECF No. 57).
2 Wales also filed two counterclaims against BNYM for declaratory judgment and quiet title. *Id.*
3 On November 1, 2018, the court granted defendants' motion to dismiss and dismissed the amended
4 complaint, finding that the statute of limitations barred BNYM's claims. (ECF No. 66).

5 Now, Rugged Oaks moves to dismiss Wales' third-party complaint as moot (ECF No. 74),
6 BNYM moves for summary judgment on Wales' first and second counterclaims (ECF No. 79),
7 and Wales moves for summary judgment on his first and second counterclaims (ECF No. 83).

8 **II. Legal Standard**

9 *a. Motion to dismiss*

10 Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss for lack
11 of subject matter jurisdiction. When a defendant brings a Rule 12(b)(1) motion, the plaintiff has
12 the burden of establishing subject matter jurisdiction. *See Rattlesnake Coal. v. U.S. E.P.A.*, 509
13 F.3d 1095, 1102 n. 1 (9th Cir. 2007) ("Once challenged, the party asserting subject matter
14 jurisdiction has the burden of proving its existence.").

15 "Mootness is a jurisdictional issue, and 'federal courts have no jurisdiction to hear a case
16 that is moot, that is, where no actual or live controversy exists.'" *Foster v. Carson*, 347 F.3d 742,
17 745 (9th Cir. 2003) (quoting *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir.
18 1999)). "If there is no longer a possibility that an appellant can obtain relief for his claim, that
19 claim is moot and must be dismissed for lack of jurisdiction." *Ruvalcaba v. City of Los Angeles*,
20 167 F.3d 514, 521 (9th Cir. 1999). Because mootness "pertain[s] to a federal court's subject-matter
21 jurisdiction under Article III, [it is] properly raised in a motion to dismiss under [Rule] 12(b)(1)."
22 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000).

23 *b. Motion for summary judgment*

24 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
25 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
26 show that "there is no genuine dispute as to any material fact and the movant is entitled to a
27 judgment as a matter of law." Fed. R. Civ. P. 56(a). A principal purpose of summary judgment is
28

1 “to isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317,
2 323–24 (1986).

3 For purposes of summary judgment, disputed factual issues should be construed in favor
4 of the nonmoving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to
5 withstand summary judgment, the nonmoving party must “set forth specific facts showing that
6 there is a genuine issue for trial.” *Id.*

7 In determining summary judgment, a court applies a burden-shifting analysis. Where the
8 party moving for summary judgment would bear the burden of proof at trial, “it must come forward
9 with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at
10 trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine
11 issue of fact on each issue material to its case.” *C.A.R. Transp. Brokerage Co. v. Darden Rests.,*
12 *Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted).

13 By contrast, when the nonmoving party bears the burden of proving the claim or defense,
14 the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential
15 element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed
16 to make a showing sufficient to establish an element essential to that party’s case on which that
17 party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving
18 party fails to meet its initial burden, summary judgment must be denied and the court need not
19 consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–
20 60 (1970).

21 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
22 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
23 *Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a dispute of material
24 fact conclusively in its favor. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
25 626, 631 (9th Cir. 1987). It is sufficient that “the claimed factual dispute be shown to require a
26 jury or judge to resolve the parties’ differing versions of the truth at trial.” *Id.*

27 In other words, the nonmoving party cannot avoid summary judgment by relying solely on
28 conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040,

1 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the
2 pleadings and set forth specific facts by producing competent evidence that shows a genuine issue
3 for trial. *See Celotex*, 477 U.S. at 324.

4 At summary judgment, a court's function is not to weigh the evidence and determine the
5 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby,*
6 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is "to be believed, and all
7 justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the
8 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
9 granted. *See id.* at 249–50.

10 **III. Discussion**

11 Pending before the court is Rugged Oaks' motion to dismiss and BNYM and Wales' cross
12 motions for summary judgment. (ECF Nos. 74, 79, 83). The court will address each in turn.

13 *a. BNYM and Wales' cross motions for summary judgment*

14 BNYM and Wales have filed cross motions for summary judgment on Wales' first and
15 second counterclaims for declaratory judgment and quiet title. (ECF Nos. 79, 83). The motions
16 raise two chief issues: (1) whether the foreclosure sale extinguished BNYM's deed of trust; and
17 (2) whether the court's dismissal of BNYM's amended complaint as time-barred entitles Wales to
18 summary judgment quieting title in his favor.

19 BNYM argues that the foreclosure sale did not extinguish the deed of trust because Bank
20 of America, as then-servicer of the loan, tendered the superpriority portion of the lien to NAS, Los
21 Prados' agent. (ECF No. 79). In light of the Nevada Supreme Court's holding in *Bank of America,*
22 *N.A. v. SFR Invs. Pool I, LLC*, 427 P.3d 113 (Nev. 2018) ("*SFR III*"), the court agrees.

23 Under NRS 116.31166(1), the holder of a first deed of trust may pay off the superpriority
24 portion of an HOA lien to prevent the foreclosure sale from extinguishing the deed of trust. *See*
25 Nev. Rev. Stat. § 116.31166(1); *see also SFR Investments*, 334 P.3d at 414 ("But as a junior
26 lienholder, BOA could have paid off the SHHOA lien to avert loss of its security . . ."). The
27 superpriority portion of the lien consists of "the last nine months of unpaid HOA dues and
28 maintenance and nuisance-abatement charges," while the subpriority piece consists of "all other

1 HOA fees or assessments.” *SFR Investments*, 334 P.3d at 411; *Horizons at Seven Hills*
2 *Homeowners Association v. Ikon Holdings, LLC*, 373 P.3d 66 (Nev. 2016) (“NRS 116.3116(2) . . .
3 is limited to an amount equal to the common expenses assessments due *during the nine months*
4 *before foreclosure.*”) (emphasis added).

5 In *SFR III*, the Nevada Supreme Court held that a foreclosure sale did not extinguish a first
6 deed of trust when Bank of America, the holder of the deed of trust, used the HOA’s
7 representations to calculate and tender the sum of nine months of delinquent assessments. *SFR*
8 *III*, 427 P.3d at 121. Although the superpriority portion of an HOA lien typically includes
9 maintenance and nuisance abatement charges, the court held that “Bank of America tendered the
10 correct amount to satisfy the superpriority portion of the lien . . . [because] the HOA did not
11 indicate that the property had any charges for maintenance or nuisance abatement.” *Id.* at 118.

12 The Nevada Supreme Court’s holding in *SFR III* controls the court’s analysis in this case.
13 Like *SFR III*, where Bank of America relied on the HOA’s representations to calculate nine months
14 of assessments, Bank of America here relied on an account statement of another property within
15 Los Prados to calculate nine months of assessments. *See id.*; (ECF No. 79). Further, Wales does
16 not dispute that: (1) NAS failed to respond to Bank of America’s letter requesting a ledger
17 identifying the superpriority amount; (2) NAS did not indicate that the property had any charges
18 for maintenance or nuisance abatement; and (3) Bank of America sent a check for nine months of
19 common assessments to NAS. *See SFR III*, 427 P.3d at 118; (ECF Nos. 79, 82). Thus, when Bank
20 of America sent the check to NAS, it properly tendered the superpriority portion of the lien.

21 Therefore, the nonjudicial foreclosure sale did not extinguish the deed of trust. *See SFR*
22 *III*, 427 P.3d at 121 (“It follows that after a valid tender of the superpriority portion of an HOA
23 lien, a foreclosure sale . . . cannot extinguish the first deed of trust”); *see also Bank of America,*
24 *N.A. v. Arlington West Twilight Homeowners Association*, No. 17-15796, 2019 WL 1461317 at
25 *2–3 (9th Cir. April 3, 2019).

26 Wales argues that BNYM lost the right to protect its interest in the property by bringing
27 this action more than five years after the date of the foreclosure sale. (ECF No. 82). The Nevada
28 Supreme Court addressed this contention in *SFR III*: “[g]enerally, the creation and release of a lien

1 cause priority changes in a property's interests as a result of a written legal document. But Bank
2 of America's tender cured the default and prevented foreclosure as to the superpriority portion of
3 the HOA's lien by operation of law." See 427 P.3d at 120. As in *SFR III*, Bank of America's
4 tender here cured the default, such that BNYM's deed of trust survived the foreclosure sale by
5 operation of law. That BNYM's amended complaint was dismissed as time-barred is of no
6 moment because nothing in NRS Chapter 116 or otherwise requires judicial action to perfect the
7 right to foreclose through a nonjudicial foreclosure sale. See *Facklam v. HSBC Bank USA for*
8 *Deutsche ALT-A Sec. Mortg. Loan Tr.*, 401 P.3d 1068, 1071 (Nev. 2017) ("[A] lender may recover
9 on a deed of trust even after the statute of limitations for contractual remedies on the note has
10 passed. Nonjudicial foreclosure is neither a civil nor a criminal judicial proceeding. It is not
11 commenced by filing a complaint with the court. NRS 11.190 serves only to bar judicial actions;
12 thus, [it is] inapplicable to nonjudicial foreclosures.").

13 Wales also argues that he "paid full, fair market value, i.e. valuable consideration, for the
14 Property" and that he "acquired the Property without knowledge of [BNYM's] competing claims,"
15 such that his interest is unencumbered by BNYM's deed of trust. (ECF No. 88). "A party's status
16 as a BFP [*bone fide* purchaser] is irrelevant when a defect in the foreclosure proceeding renders
17 the sale void." *SFR III*, 427 P.3d at 121. "[A]fter a valid tender of the superpriority portion of an
18 HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it
19 cannot extinguish the first deed of trust on the property." *Id.* Because BNYM validly tendered
20 the superpriority portion of Los Prados' lien, the foreclosure sale was void as to the superpriority
21 portion. BNYM's deed of trust thus remains on the property and Wales' status as a BFP is not to
22 the contrary.

23 In summary, the court finds that BNYM's deed of trust was not extinguished by Los
24 Prados' nonjudicial foreclosure sale and therefore continues to encumber the property.

25 *b. Rugged Oaks' motion to dismiss*

26 Wales' third-party complaint against Rugged Oaks alleges three causes of action for breach
27 of contract. (ECF No. 57). Rugged Oaks contends that Wales' third-party complaint should be
28 dismissed as moot because BNYM did not succeed in its complaint against Wales. (ECF No. 74);

1 (see ECF No. 66 (dismissing BNYM's amended complaint)). Rugged Oaks further contends that
2 each cause of action, by its own terms, is predicated upon judgment being entered in the bank's
3 favor. (ECF No. 74). Wales responds that he continues to have a legally cognizable interest in
4 the outcome of this litigation because BNYM has already expressed its intention to appeal the
5 court's order dismissing BNYM's amended complaint and because title has not yet been quieted
6 in his favor. (ECF No. 77).

7 For the reasons set forth in section III.a above, BNYM's deed of trust continues to
8 encumber the property. There thus remains a live controversy between Rugged Oaks and Wales
9 with regard to Wales' causes of action for breach of the purchase agreement, breach of the grant,
10 bargain, and sale deed, and for specific performance in relation therewith. Wales may therefore
11 proceed on his third-party complaint against Rugged Oaks.

12 **IV. Conclusion**

13 Accordingly,

14 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Rugged Oaks' motion
15 to dismiss (ECF No. 74) be, and the same hereby is, DENIED.

16 IT IS FURTHER ORDERED that BNYM's motion for summary judgment (ECF No. 79)
17 be, and the same hereby is, GRANTED.

18 IT IS FURTHER ORDERED that Wales' motion for summary judgment (ECF No. 83) be,
19 and the same hereby is, DENIED.

20 DATED January 7, 2020.

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22 UNITED STATES DISTRICT JUDGE
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